SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

MELVIN A. HOYT,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

Error to the SUPREME COURT of the STATE OF WISCONSIN.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The good Athanasius, it is said, confessed that in his speculations on the Trinity "the more he thought the less he comprehended; and the more he wrote, the less capable was he of expressing his thoughts."

2 *Gibbon*, 488.

At some risk of demonstrating, without, however, formally confessing, a like incapacity to deal with the questions presented in this record, I have ventured to further tax the patience of the Court by a brief discussion of one aspect of the case which has not been fully treated, adding at the same time a few citations, etc., on propositions already discussed.

In this connection I am tempted to quote, as descriptive of the law of Criminal Conspiracy, Lord Camden's definition of Judicial discretion, which he declares to be "the law of tyrants. It is always unknown; it is different before different Judges; it is casual and depends upon constitution, temper and passion."

I have already indicated what seems to me to be the true course which the Courts should pursue in order to rescue the law from this condition. But that it is in such a state of confusion is not so much, as many critics seem to suppose, the fault of Courts, Judges and lawyers, as it is a result of the inherent difficulties of the subject.

Fully conscious of those difficulties and of the imperfect manner in which the brief already submitted deals with them, I still hope in a measure to escape the imputation of further darkening "counsel by words without knowledge," by leaving the general subject of criminal conspiracy where it is left in that brief; and now to discuss the question how far the decisions upon anti-trust legislation, so much debated in the courts, and the fact that in Wisconsin such legislation exists, bear upon this case.

I.

Undoubtedly in discussing the effect of the Fourteenth Amendment upon the power of police possessed by the several states, it is admissible and to some extent necessary to examine decisions made as to the consistency of such Statutes with the provisions of that amendment.

But to say, speaking generally, that such Statutes may be adopted by the states, as well since, as before its adoption, is not to determine this case. Nor do we approach much nearer its correct decision by conceding that section 1747e of the Statutes of Wisconsin of 1898, cited by the learned Attorney General is not inconsistent with that amendment.

Before proceeding on this line I must however refer to what appears to be a radical divergence of view between the learned Attorney General and myself as to the relation of this amendment to the police power of the state.

At Page 12 of his brief he quotes Mr. Justice Field to establish the proposition that neither the Fourteenth nor any other amend-

ment to the Federal Constitution was intended to interfere with the police power of the state.

It may be that at one time the decisions of this Court seemed to lend some color to this view.

An intelligent commentator on our jurisprudence observed some years since: "Under the definition given of the police power, that it is the authority residing in every sovereignty to pass laws for the internal regulation and government of the state necessary for the public welfare and the judicial concession that this power is not impaired by the Fourteenth Amendment, there is grave danger that that amendment will become irretrievably lost within the illimitable or indescribable boundaries of the police power."

State vs. Goodwill, 25 Am. St., 863-883 in notes.

But I should suppose that, under the rule laid down in the recent case of *Connolly vs. Union Sewer Pipe Co.*, 184 U. S., 540 (cited pp. 76-7 brief) where the case of *Barbier vs. Connolly*, from which the Attorney General quotes, was cited in support of the judgment of this Court in the later case, the question raised is hardly open to debate. Indeed it is possible that no such contention on the part of the State is intended; and in any event it would appear to be quite baseless.

Recurring now to the subject in view, there is no doubt that many so-called anti-trust statutes have been sustained by the Courts of last resort in various states. But the statute in question is not, nor does it purport to be, such legislation.

The plaintiff in error is not charged with any infraction of such a statute; he is not accused of a conspiracy to restrain or monopolize trade but with conspiring wilfully and maliciously to injure etc., by the methods stated in the information. The gist of the charge is this particular conspiracy or criminal concert. It would be impossible to sustain a conviction if this were wanting, even though the specifications might be sufficient to show some other purpose unlawful under the anti-trust Acts; for no such purpose is charged. Had there been a general charge of conspir-

acy wilfully and maliciously to injure, etc., in the language of the statute, without particulars and had plaintiff in error without calling for particulars demurred, the information might have been sufficient under this statute.

But it clearly would have been insufficient under the anti-trust act referred to by the learned Attorney General. (P. 12 Brief.)

The mere addition of particulars indicating the means adopted in execution of the conspiracy charged, could not make it good under the latter statute nor is there any such view expressed by the Court below.

There is no charge that the accused "combined or conspired with any other person to monopolize or attempt to monopolize any part of the trade or commerce" of the state.

That is the gist of the offense prohibited by that statute. Whether valid or not, though I perceive no reason why it is not, that question is entirely foreign to this case. For reasons already indicated, I am clearly of opinion that the particulars stated do not show such conduct as is within the prohibitions of that act. But in the absence of a definite charge of such a conspiracy and in the face of a clear and unambiguous charge of a conspiracy to do something else, prohibited by another statute, I am quite at a loss to understand why the learned Court below and the learned Attorney General engage themselves so much with anti-trust statutes, except possibly on account of the dearth of other more relevant matter to support the judgment complained of.

In this case it must not only appear that the things done by the accused may, consistently with consitutional limitations, be prohibited and that such prohibition has been imposed; but it must also appear that the accused is charged with the offense thus created.

As he is not charged with any offense against the anti-trust statutes of Wisconsin, their provisions are immaterial. That such statutes there and elsewhere are generally sustained as a legitimate exercise of legislative power by no means demonstrates the admis-

sibility of a statute like that in question, having apparently an entirely different scope and object and bearing also such a sweeping and proscriptive character. The real question indeed in this case is not even whether the legislature may properly penalize such conduct as that of which the accused stands convicted. But whether it can denounce the penalties of the law not only against such conduct but against everything else that falls within the inhibitions of the act in question. *Colon vs. Lisk*, 153 N. Y. 188 *infra*.

It is quite unnecessary therefore in this aspect for us to concern ourselves with anti-trust laws or the possible effect which a decision adverse to the state in this case might have upon the power of legislation in this attractive and inviting field. Indeed nothing ought to be done, except with the greatest caution, to disturb the general confidence in the popular panacea of a law against the trusts, as a universal cure-all for the ills of modern commercial and economic life. The victims of such distresses are apparently just now so enamored of this popular remedy that in clamoring for its application and enforcement and, indeed, in the mere knowledge of its existence, they derive such great satisfaction as largely to forget their sufferings.

Certain great doctors of the body politic too, having discarded all previous nostrums advocated by other practitioners, not to mention several of their own, now range up and down the land, after the manner of a modern Paracelsus, decrying in a loud voice all other methods and schools of healing and proclaiming this the only way to economic and social health.

Whether, as the court below indicates, the man of learning who challenges such power of legislation must be a man of courage or not, it is quite clear that he who questions its efficacy must be one of no little hardihood. It is most fortunate, therefore, that no such exacting requirements are demanded in the adequate discussion of this case.

I by no means concede that the accused could be properly convicted under the anti-trust statutes of Wisconsin.

The combination or conspiracy charged imposes no restraint on trade. Advertising doubtless promotes and fosters trade but it is not trade.

I am familiar with no decision holding that an agreement or combination of newspapers in relation to the prices of advertising is a contract in restraint of trade. Certainly I do not imagine that the learned Attorney General will assert that unions of laboring men and mechanics to increase wages are criminal conspiracies under such acts.

The decision of Mr. Justice Harlan in the case of the Northern Pacific strike is a distinct negative on such a theory and this accords with all the cases. Yet such combinations have a much more intimate connection with and direct effect upon trade and commerce than that charged in this case. But whether this view be or be not sound is immaterial; for such statutes have nothing to do with this case, nor indeed do I understand the court below to expressly hold the contrary but rather to reason, by a kind of vague analogy, that because such statutes are upheld, the statute in question may be.

If they do not apply, then the only statute in question is that already quoted and so much discussed. Indeed such seems to be the holding of the court.

I recur therefore to the proposition that it is not enough to say that the state might have adopted a statute prohibiting and punishing conduct such as this information, in its particulars and specifications, charges against the accused.

As Counsel for plaintiffs in 34 & 35 well say the constitutionality of a penal statute must be tested not only by what has been attempted under it, but by what must be declared criminal in accordance with its plain prescription.

This is a well settled canon of constitutional law.

In *Colon vs. Lisk* already cited, (153 N. Y. 188, 60 Am. St., 609) a statute providing that every vessel by aid of which one person should interfere with the oysters of another planted in the

waters of the state, or remove stakes, buoys or any boundary marks of any planted beds, might be seized within one year thereafter and being condemned before a Justice of the Peace should be sold and the proceeds appropriated by the state, was held unconstitutional. The Court among other things said:

"In discussing the constitutionality of this act, it is to be remembered that the question is to be determined, not by what has been done under it in any particular instance, but by what may be done under and by virtue of its authority (citing cases.) When considered with that idea in view, it at once becomes obvious that this statute may be employed to confiscate to the state the entire property of an individual for the commission of a trespass upon the property of another, however slight, and this, too, although the owner is guiltless of any intended or actual wrong."

Suppose that the Legislature of Wisconsin had seen fit to declare that the offense *Majestas laesa* should thereafter exist in that state, and that whoever spoke or wrote disrespectfully of the Governor or any other state officer or conspired with one or more to induce others so to do should be deemed guilty of that offence and on conviction punished accordingly. Persons being charged under this statute with having conspired to induce the publisher of a newspaper to commit this specific offense, the specifications in the information showing that the particular language of which the conspirators sought to secure publication involved a grossly libelous charge of embezzlement against the Treasurer of the State, would the hypothetical statute, when examined as to its constitutionality, be in any wise aided because under other constitutional statutes the conspirators might have been prosecuted for conspiring to publish a false and malicious libel? Or because there being no such statute, it was within legislative competence to enact one? Discussion of this subject is superfluous; for no where is the rule better settled than in this court.

Baldwin vs. Franks, 120 U. S., 678.

In that case previous decisions on the same point are collected.

I have no hesitation therefore in affirming that whatever may be the power of a state in respect of legislation against trusts and combinations to engross or restrain trade, this statute can not rest on that power because it is not addressed to these subjects; and that it is wholly inadmissible to attempt either to limit its general terms or to distort its language so as to make it applicable only to such conspiracies.

It is perfectly obvious from the existence of other statutes, to which the Attorney General directs attention, that there was no necessity for this statute to reach such conspiracies against trade and commerce.

Therefore there is no warrant whatever for any suggestion that a decision against the state in this case would limit the power of a state to legislate against such unlawful combinations. But if it would, then it ought to be so limited; for constitutional rights must be maintained at whatever cost.

II.

I now call attention to a few other cases where the Fourteenth Amendment has been successfully invoked against state legislation.

A statute forbidding an employer to discharge an employe because a member of a labor organization, is not permitted under this amendment.

State Ex rel. Zillmer vs. Kreutzberg, 114 Wis., 530.

A law prohibiting Railway ticket selling except by agents authorized by Railway Companies is unconstitutional.

People vs. Warden of Prison, 157 N. Y. 116. S. C. 68 Am. St., 763.

So is a law prohibiting giving trading stamps.

State vs. Dalton, 22 R. I., 77-86-88-9, S. C. 84 Am. St., 818.

The opinion in this case contains an extensive collection of authorities. At Page 86 the court said, referring to the constitutional right to liberty:

"This inalienable right is trenched upon and impaired whenever the legislature prohibits a man from carrying on his business in his own way, provided always of course, that the business and the mode of carrying it on are not injurious to the public, and provided also, that it is not a business which is affected with a public use or interest."

After alluding to the great injury which the mammoth department stores inflict on small shopkeepers and citing *Chicago vs. Netcher*, 183 Ill., 104, as holding that such can not be prohibited by law, the Court says:

"It may be demoralizing to legitimate business for two great dry goods houses to cut prices in the attempt to undersell each other, or for two competing railway lines to sell tickets at half price in the attempt of each to get an advantage over the other; yet probably no one would claim that such competition could be prohibited by law. ..... The great law of competition invites and promotes this sort of demoralization and the remedy for one who is injured by it lies not in legislation but in being able to keep pace with the changed, if not always improved, methods." P. 89.

A statute of New York requiring contractors with a city for public works to pay their laborers and workmen not less than the prevailing rate of wages is unconstitutional.

Paternal legislation of this general character is condemned in the opinion.

People vs. Coler, 166 N. Y., 1. S. C., 82 Am. St., 605.

In the opinion in that case a large number of cases are cited holding similar views. Among others,

People vs. Hawkins, 157 N. Y., 168 Am. St., 736.

In this case it was said, the act in question requiring prison made goods to be stamped before sale so as to show where made, etc.

"The statute in question is aimed at property produced by a certain kind of labor, and the plain purpose is to depress its value or restrict its sale in order to enhance the price or enlarge the demand for the same kind of property produced by some other

kind of labor. It belongs to a class of laws which have become quite common in recent years, all resting largely upon the notion that the important problems involved in the social or industrial life of the people may be solved by legislation. This theory has, no doubt, a certain fascination over some minds, but so long as legislative power is circumscribed by the restriction of a written constitution, a statute like this can not be sustained by the courts."

An act providing for the weekly payment of wages was held to be unconstitutional as depriving persons thereby affected of property or liberty without due process of law.

Republic Iron & Steel Co. vs. State, (Ind), 66 N. E. Rep., 1005.

In a very recent case the Supreme Court of Illinois has held a statute providing for free employment agencies which prohibited furnishing employes or information to any one whose employes were on strike or locked out contrary to this amendment.

Mathews vs. People, 202 Ill., 389-401.

It is true the court is guilty of a slight inadvertence in supposing that the fifth amendment applies; but the conclusion that the fourteenth condemns the act in question is distinctly announced and on this ground the whole act was condemned.

As in the former brief I digressed from the argument to say a word on the subject of boycotting, I venture to print something on that topic which has since come under my observation.

The language quoted is that of a very distinguished lawyer who afterwards held high Judicial position. That he employed it as an advocate and not as a Judge, possibly detracts from it the somewhat adventitious weight accorded to Judicial utterances. But his observations are so practical and sensible, that I am satisfied their inherent and intrinsic merit entitles them to consideration.

"My Lords, in this matter of boycotting, may I be forgiven for using the celebrated exclamation of Dr. Johnson, and say: "Let

us clear our minds of cant."* Boycotting has existed from the earliest times that human society existed. Up to a certain point, boycotting is not only not criminal, but I say is justifiable and is right. For what does boycotting mean? It means the focusing of the opinion of the community in condemnation of the conduct of an individual of that community who offends the general sense of propriety, or offends against its general interests. Is there no boycotting at the bar? Is there no boycotting in the other professions? Is there no boycotting in the church? Is there no boycotting in politics? Is there no boycotting of tradesmen in Election times? What is the meaning of "sending a man to Coventry?" I say that boycotting,—I am not justifying intimidation; I am not justifying force; I am not justifying violence in connection with it; those are different things. I am talking of an act of moral reprehension called boycotting, and I say it always has existed and always will exist." *Sir Charles Russell*, before Parnell Com. 215.

The same views are taken and blacklisting is held lawful in *Boyer vs. Western Union Tel. Co.*, 124 Fed. Rep. 246—Rogers D. J.

Counsel in 34 and 35 have called attention to a very able paper by Mr. L. C. Krauthoff, now of the Chicago Bar, which he read before the American Bar Association in 1898 on "Malice as an ingredient of a civil cause of action." 21 Am. Bar. Rep., 335.

All of the cases then reported on this subject are subjected by the learned author, to a careful and discriminating scrutiny. His paper is a valuable and important contribution to the literature of the law on this general topic.

III.

The learned Attorney General concludes his brief after referring to sundry statutes in force in various states with these observations.

"It will be seen that these various statutes while differing

* What the critical old Doctor really said to Boswell, was, "My dear friend, clear your *mind* of cant." This is much more Johnsonian than any phrase reflecting at all on his own mental attitude.

somewhat in their terms and scope, are all directed to the same end, to-wit: the encouragement of industry, by the *prevention of malicious* interference therewith, and the prohibition of combinations organized and intended for the purpose of hampering, hindering or destroying individual enterprise in legitimate trade and commerce. The fact that such statutes so generally prevail in the various states is strong evidence, not only of the necessity for such restraints, but of the general policy of legislation on the subject and the understanding of the courts that such statutes are not without the legislative power."

The cases which I have cited illustrate how the courts regard some of the statutes thus referred to. Statutes like that of Indiana as to discrimination by employers between Union and Non-union labor and like that of Minnesota as to blacklisting have been in effect condemned by the courts as beyond legislative power (v pp. 89-84 brief and cases cited above.)

But, irrespective of this, it must be noted that counsel declares the purpose of such statutes to be to prevent *malicious* interference etc. Here, however, we have a statute denouncing its penalties against wilful interference whether malicious or not. The information charges a combination or conspiracy *wilfully and maliciously* to injure the Journal Company. (Manscript 10.) But the statute penalizes such conduct if either wilful or malicious. The question raised must be decided not on the form of the accusation but on the language of the statute; and this is not restricted to malicious interference as counsel, wholly without warrant, assumes.

I call attention to the following *Errata* in brief. P. 93, line 15; read "permissible" not "presumable." P. 109, line 9; read "combine wilfully or maliciously to injure;" not "wilfully or maliciously combine to injure."

There are several errors, typographical or otherwise, in the opinion as printed, like that in Baron Bramwell's name (p. 162).

But as they exist in the opinion as printed officially, I have not attempted to correct them.

Respectfully submitted,

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PLAINTIFF'S BRIEF

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

MELVIN A. HOYT,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

Error to the Supreme Court of the State of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR ON RE-ARGUMENT.

It is not my purpose to here restate those arguments which, possibly with too much fullness, I have heretofore elaborated in print against the judgment pronounced in this case by the Supreme Court of Wisconsin. Without abandoning or modifying the positions which have been thus taken, I desire to offer some further considerations, perhaps from a narrower point of view, but which I believe to be conclusive against that judgment.

The opinion of the Supreme Court of Wisconsin has, no doubt, its merits; but lucidity is not one of them. It is impossible to tell exactly what the court intended by some of the language there employed.

To say that malice is to be inferred from the performance

of an unlawful act, and that certain conduct is unlawful because of malice thus presumed, is not only not convincing; it is the plainest sort of fallacy. I can not believe, therefore, that the learned court below intended to say that conduct, otherwise lawful, warrants an inference of malice; and that the fact of malice thus established affects such conduct with illegality—and hence the inference of malice follows. On the contrary, notwithstanding some language in the opinion which seems so to declare, what is really intended, I imagine, is that a purpose or desire to injure, *i. e.*, actual malevolence, infects the act otherwise innocent and brings it within the statute. I feel warranted also in the statement that the opinion, as a whole, holds that where such evil purpose either in whole or in part inspires the conduct of those charged under the statute, then their conduct comes within its penalties, although another motive, namely, a desire to benefit the alleged conspirators in the way of trade, as against a competitor, also to some extent induced the conduct claimed to be unlawful. Thus construed I maintain that the statute in question is clearly unconstitutional under the fourteenth amendment. And as this precise point, though argued orally, is not, perhaps, clearly developed in my former briefs, I deem it not improper to discuss it now.

I must at this point briefly restate the facts.

The publishers of four daily newspapers in the city of Milwaukee became engaged in a controversy, apparently over the question of circulation. The Journal announced that its circulation had so far increased that it was justified in increasing and proposed to increase its advertising rates twenty-five per cent;

thereupon the publishers of three other daily papers, the Sentinel, a morning paper, and the Wisconsin and News, evening papers, entered into an agreement that if any one advertised in the Journal at these rates, they would not receive his advertisement in any of their papers, unless he paid them a similar increase in their rates and advertised in all three. Obviously the effect of this was to discourage advertising in the Journal, and to promote the advertising patronage of the three papers whose publishers were parties to this arrangement. I shall not dwell upon this as it has been dealt with at some length by learned counsel for plaintiffs in error in the cases submitted with this case, and because I think the conclusion is so obvious as not to admit of serious dispute.

There was a statute of Wisconsin, 4466a, R. S. 1898, which is as follows:

"BOYCOTTING, STRIKES AND LOCKOUTS.

"Injury to Business; Restraint of Will.—Section 4466a. "Any two or more persons who shall combine, associate, agree, "mutually undertake or concert together for the purpose of "wilfully or maliciously injuring another in his reputation, "trade, business or profession by any means whatsoever, or for "the purpose of maliciously compelling another to do or perform "any act against his will, or preventing or hindering another "from doing or performing any lawful act, shall be punished by "imprisonment in the county jail not more than one year or by "fine not exceeding five hundred dollars."

Under that statute the proprietors of the Journal caused criminal informations to be filed against the publishers of each of the three newspapers named, including Mr. Hoyt, who was the publisher of the News, and on behalf of whom this argument is filed. This information is fully stated at page 7 of my former

brief. It charges the plaintiff in error with conspiring with Mr. Aikens of the Wisconsin, and Mr. Huegin of the Sentinel, wilfully and maliciously to injure the Journal Company in its business by agreeing that, if any merchant or other person, or corporation, should pay or agree to pay to the Journal Company its increased rate for advertising, in such case the person or corporation so advertising in the Journal, should not be permitted to advertise in either of the three other papers, except upon the terms indicated; that the plaintiff in error notified the advertising patrons of the Journal of this agreement, and that many of them were thereby induced to withdraw their advertisements therefrom, greatly to the injury of the trade and business of the Journal Company, and that the plaintiff in error with his other co-conspirators refused to allow the advertisements of divers persons to be inserted in either of said three papers because they had paid or agreed to pay the Journal Company the increased rate, and that, by reason of this combination, many merchants in Milwaukee and elsewhere, were prevented from advertising in the Journal.

The gist of the charge is a conspiracy unlawfully, and with the intent wilfully and maliciously, to injure the Journal Company in its trade and business. (Transcript 10.)

The opinion of the court below on a habeas corpus proceeding when the plaintiff in error was arrested on a warrant issued by an examining magistrate on a complaint substantially identical with the information, contains the only discussion of this case bestowed by the Supreme Court of Wisconsin upon it.

On final hearing on demurrer to the information the judgment of the Municipal Court of Milwaukee County was against

plaintiff in error and was affirmed on a short opinion in the Supreme Court, which simply referred to the opinion of the court in the habeas corpus proceeding for the grounds of the decision. (Transcript 19.) That opinion is printed as an appendix to my former brief, and is also printed in the appendix to the brief of counsel for Messrs. Huegin and Aikens on re-argument.

On December 7, 1900, a re-argument was ordered in the court below of the following question only: "Does the word 'injuring,' in Sec. 4466a, Stats. 1898, mean anything more than inflicting an injury for which a civil action for damages can be maintained, and if so, is the law constitutional?"

The State ex rel. Durner v. *Huegin*, 110 Wis. 189.

I wish, however, before proceeding to the point to which this argument is mainly directed, to refer to another view which seems to be relied on to some extent by the state. That is, that the contract or conspiracy charged is such as the state might lawfully interdict as in restraint of trade; and hence is one which the accused had no constitutional right to make under the guaranty of liberty in the fourteenth amendment. I have argued this in my supplemental brief, and purpose now merely to restate my position.

That is, first, that the accused are not charged with any such offense.

The charge is of conspiracy wilfully and maliciously to injure the Journal Company in its business; not of conspiracy to restrain trade. The particulars contained in the information, as held by the Wisconsin Court, may be properly referred to for the purpose of limiting and defining the nature of the conspiracy charged. But that conspiracy as charged, being the gist of the

offense, the particulars can not be allowed to alter its character and take the place of a definite charge of another and different offense.

Again, the Wisconsin Court seems expressly to hold that without the statute in question the conviction could not be upheld in view of the state of the law in Wisconsin.

But independently of this, a charge and conviction of a particular offense under one statute can not be upheld on the ground that, under the particulars stated in the information, the accused might have been proceeded against under another statute and upon a charge of a different offense. This would deprive a defendant of his right to know the nature and cause of the accusation against him and would not be due process.

This must also be true. Suppose this court, contrary to the views urged for the accused, should be of opinion that the combination shown in the particulars, was in restraint of trade and subject to lawful prohibition by the state. This court would then also hold that the accused had no right, secured by the Federal Constitution, to enter into such a combination. But having thus affirmed the right of the state to interdict such conduct, thus denying the constitutional right of the accused to pursue it, the next question would be, does the statute by which the state has attempted to exercise its rightful power, transcend the constitutional limitations imposed by the fourteenth amendment?

This question must be determined, not by what has been done or attempted under the statute in a particular instance, but by what may be done by virtue of its authority.

If it be conceded *arguendo* that the conduct of the accused as charged, is such that it comes within a statute directed against

combinations in restraint of trade, and the constitutionality of such a statute be also conceded, these concessions do not aid the state. For it is not at all a necessary element of the offense created by this statute, that the conspiracy denounced be in restraint of trade. It is within the compendious statutory interdict, if its aim be wilfully or maliciously to injure another in his business "by any means whatsoever." And the court holds that to inflict loss is to injure.

Therefore persons charged under this act may be convicted who are not charged with conspiracies in restraint of trade. Hence, obviously it can not be restricted to such conspiracies.

If this statute, as construed by the court below, includes within its prohibitions, combinations which are essentially rightful and constitutional, it can not be sustained as to such a combination as is wrongful and might have been constitutionally forbidden by this statute, had its prohibitions been limited only to such or similar combinations. This is not an instance where it is possible to say a statute is valid in part and void in part.

Baldwin v. *Franks*, 120 U. S. 678.

Indeed it is strange, as, on the theory of counsel, such ample remedy under the anti-trust statutes of that state exists to reach and punish these offenders, that, in view of the fact that such statutes seem to be unassailable on constitutional grounds, these proceedings were not brought under their comprehensive provisions.

It must be assumed, as the language of this act plainly indicates, that in its adoption the legislature aimed at offenses other than contracts or combinations in restraint of trade, which certainly are not expressly mentioned in this statute, and

are fully dealt with in other statutes; as, therefore, the legislature, and in this proceeding the prosecuting officers of the state and the court of last resort, seem to have ignored the anti-trust statutes as affording any basis for such a charge, such statutes may well be dropped from the discussion here; and, I will not, in view of these considerations, further argue their relevancy, nor the proposition that the question whether they are or are not consistent with the fourteenth amendment, is not the question presented in this case.

Whatever the power of the state over the subject-matter of legislation, the Federal Constitution secures immunity, not merely in respect of rights which are referable to its provisions, but also from prosecutions under state statutes, enacted in defiance of its limitations.

The statute in question as construed by the Supreme Court of Wisconsin, when examined, not merely to see what has been attempted under it in this case, but to determine what may be done under its authority, is, for reasons already urged, in conflict with the fourteenth amendment; and as the same court has held its validity essential to this conviction, it is peculiarly and especially true in this case that if thus invalid, there is no law to sustain the conviction and it must be reversed.

To proceed now to the main point to which this argument is addressed, I assume that counsel for the state will not deny that, in the view held by the Wisconsin court, it is not the conduct of the accused but the motives that prompted it which bring it within the statute. It would indeed be idle to controvert this proposition. For the entire opinion on the merits, is devoted to an attempt to demonstrate that this statute is aimed at combina-

tions entered into, not to promote the business or to advance the pecuniary interests of those entering into such combinations, but planned to injure another in his trade or business.

And I understand that court to be, therefore, of the opinion that unless such purpose or intent, call it malice or what you will, appears, the offense denounced by the statute has not been committed. Though I by no means agree, it is not necessary to the immediate purpose of this discussion to quarrel with this view.

Having announced this, the learned court proceeds one step further and holds that it is not necessary that such evil purpose should be the sole motive impelling to the combination; but that if it exists, in whole or in part, or co-exists with a purpose to advance the interests of those in the combination by means not otherwise unlawful, then the offense contemplated by the statute has been committed.

This is a construction of the statute of a state by its court of last resort; and the question now to be discussed is whether this statute, so construed, is consistent with the fourteenth amendment.

I undertake to say that it is not; that this is substantially if not literally the same question that was presented in the Northern Pacific strike case where the Federal Circuit Court in Wisconsin announced the same view as that of the court below, and where the Circuit Court of Appeals for that Circuit through Mr. Justice Harlan, reversed the Circuit Court on precisely this point.

This view acquires added force from the fact that the Wisconsin court, in the opinion below, quotes with approval from the

opinion at the Circuit in that case, on the point as to which the Court of Appeals differed with the Circuit Court.

That case is reported at the Circuit as *Farmers' Loan & Trust Company* v. *Northern Pacific Railway Company*, 60 F. R. 803. Judge Jenkins, a very accomplished judge, gave the matter careful consideration, and wrote an opinion of great length, which in point of lucidity, sound reasoning and attractive literary style, must be regarded as the ablest presentation in the reports of the views held by the court below. He went on at great length to discuss the irreparable injury that the railroad system in question would suffer through the sudden cessation of work of its 12,000 employes; and while recognizing the general proposition that men might work for whom they would and quit when they saw fit, he found in the law some limitations on this right; and after a variety of graphic and striking illustrations where he held that it did not exist, and a further reference to the paralysis in the operation of this great system which would follow upon the exercise of the right claimed by the men, he said (page 813):

"All these hardships and inconveniences, it is said, must be submitted to, that certain of these men, discontented with the conditions of their service, *may combine and conspire, with the object and intent of crippling the property, to suddenly cease the performance of their duties.* It is said that to restrain them from so doing is abridgment of liberty and infringement of constitutional right. I do not so apprehend the law. I freely concede the right of the individual to abandon service at a proper time and in a decent manner. I concede the right of all the employes of this road acting in concert to abandon their service at a proper time and in a decent manner; but I do not concede their right to abandon such service suddenly and without reasonable notice."

Referring to the injunction then in force, a motion to modify

which, on the point indicated, was then under consideration, he remarked (page 814–815):

"The restraint imposed was with reference to combining and conspiring to abandon service with the object and intent of crippling the property. Its office was to restrain the carrying into effect of the conspiracy."

He then inquires if such a conspiracy was unlawful, and quotes the language of Chief Justice Gibson, which is quoted in the opinion of the court below. He then proceeds to cite the section of the Wisconsin Statutes here in question, and after an extended and very elaborate discussion, to refuse the motion to modify the injunction, which prohibited employes on this railway either from combining or conspiring to quit or actually quitting the service of its receivers with intent to cripple the property, or so as to cripple the property, and prevent and hinder its operation.

In the Court of Appeals the case is reported as *Arthur* v. *Oakes*, 63 F. R. 310, and the opinion was written in that case by Mr. Justice Harlan. In that court apparently the case also received great consideration. It was there held that an injunction would not lie to prevent men from quitting the service of a railway company whatever other remedies might exist in the law. The injunction against combining with the object and intent, as the court said (page 320), not simply of quitting the service of the receiver because of the reduction of wages, but of crippling the property in their hands and embarrassing the operation of the railroad, was sustained because it was said the persons sought to be restrained admitted that unless the restraining power of the court was exerted, the dissatisfied employes and others co-operat-

ing with them would physically disable and render unfit for use the cars and other property in the possession of the receiver, and by force, threats and intimidation prevent the receivers from operating the road; and the court said that the general inhibition against combinations and conspiracies with the object and intent of crippling the property, must be construed as referring only to acts of violence, intimidation and wrong, and it was distinctly said that these words in the injunction were not to be interpreted as embracing the case of employes who, being dissatisfied with the proposed reduction of their wages, withdrew on that account singly or by concerted action without undue interference with others. The court then proceeded to employ the language which I have already quoted in my main brief, but which for convenience I repeat here:

"These employes having taken service first with the company, and afterwards with the receivers, under a general contract of employment, which did not limit the exercise of the right to quit the service, their peaceable co-operation as the result of friendly argument, persuasion or conference among themselves, in asserting the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal or criminal, although they may have so acted in the *firm belief and expectation* that a simultaneous quitting without notice *would temporarily inconvenience the receivers and the public.* If, in good faith and peaceably, they exercise their right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free action of others, they can not be legally charged *with any loss* to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they were willing to remain in the service. Such a loss, under the circumstances stated, would be incidental to the situation, and could not be attributed to em-

ployes exercising lawful rights in orderly ways, or to the receivers, when, in good faith and in fidelity to their trust, they declare a reduction of wages, and thereby cause dissatisfaction among the employes, and their withdrawal from service. * * *

What we have said about illegal combinations has no reference to such associations, but only to combinations *formed with the intent to employ force, intimidation, threats or other wrongful methods*, whereby the public will be injured, or whereby will be impaired the absolute right of individuals, whether belonging to such combinations or not, to dispose of their labor or property upon such terms as to them seem best."

I regard the phrase in this extract referring to the withdrawal of the men from service and stating that it would not have been illegal or criminal, although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public, as precisely equivalent to saying that it would not have been illegal, although the men took that course in the firm belief and expectation that their conduct would injure the business of the receivers engaged in operating the road. Holding such belief and expectation, it is most apparent that under the doctrines of the criminal law, they must be regarded as intending this definite consequence; and it is a matter not of law, but of common sense, that it is precisely this injury or inconvenience upon which men in organizing a strike rely to compel their employers to come to terms with them. I feel warranted, therefore, in saying that the decision of the Federal Court at the Circuit in this case, relied upon by the Supreme Court of Wisconsin on this precise point, has been overruled, and that the decision of the Circuit Court of Appeals in the same case is an authority against the opinion of the court below.

But it seems to me that the position of that court in this regard is clearly untenable. Counsel for plaintiffs in error in the two other related cases has amply demonstrated that a right, the exercise of which is regarded as criminal or not, as a jury may find with reference to the motive of its exercise, is of a most precarious and uncertain character and in effect no right at all. It is still more obvious that a metaphysical inquiry such as that suggested by the Wisconsin court as to the nature of the mixed motive which may influence men acting for the purpose of promoting their own interests and yet intending injury to their competitors, would be most fruitless and impossible. In every such case arising in the course of trade competition, it is too obvious for argument that if the motive of the alleged conspirators be to gain trade at the expense of their competitors, they must in every case contemplate, and, therefore, in the law must be deemed to intend, not only to increase their own business, but by taking away business from others, to injure the business of their competitors.

Now as I understand the rule in the class of cases upon which the Wisconsin court relies, so far as any entitled to serious consideration by this court are concerned, such a purpose to injure is never held to affect the legality of a combination to promote the interests of those engaged in it. It is only where such malice or malevolence or evil intent, however named, is the sole motive for such a combination that it becomes an unlawful conspiracy; and this limitation upon the doctrine of the Wisconsin court has been recognized with respect to offenses created by statute in at least one case in Massachusetts, to which I referred on the argument, and of which I shall presently say something

further. On the authority of that case Mr. Rawle in his edition of Bouvier's Law Dictionary defines malice as "A malevolent motive for action without reference to any hope of a remoter benefit to one's self to be accomplished by the intended harm to another."

I do not understand that the learned court below in its opinion discriminates in this regard at all between the conduct of conspirators and of individuals, except in one particular. It is said in the opinion that one man through purely malicious motives may attract to himself another's customers and the injury be so slight in contemplation of law that the maxim *de minimis* applies. But still I understand the court to hold that that would be an injury in the eye of the law which, however, might not be redressed because of its insignificance. I should not, however, make this statement merely from this dictum, but rather from the discussion (pages 155 *et seq.*, my original brief, where the opinion of the court is printed). It was there said, among other things, by the court, discussing the Mogul Steamship Company case:

"The free course of trade that one or a number in combination may legitimately enjoy, does not include the right to maliciously injure another in his free course of trade."

In discussing *Allen* v. *Flood*, it was said that there the element of conspiracy was absent but the element of malice was present and that the majority of the court there decided that malice in and of itself could not render that a ground for civil liability which without it would be lawful. It is true the Wisconsin court did then refer to the reasoning of the House of Lords as applied to conspiracy as being out of harmony with right and justice and prior decisions; but the learned court

criticised the decision in *Allen* v. *Flood* and cited with satisfaction the extravagant language of the Lord Chancellor and one or two other of the Law Lords in their criticism of the majority. All the English cases were, it is true, civil cases; but if I am not mistaken in the view of the learned court below, they were deemed none the less relevant to this discussion.

I venture the suggestion that if it is within legislative competence to declare that an act of one or of several, otherwise lawful, becomes criminal when done maliciously, that term means the same thing in both classes of statutes.

In *Barclay* v. *Abraham*, 64 Lawy. Rep. Ann. 255, the Supreme Court of Iowa decided a case which is digested as showing that a man might not, with the malicious purpose of depriving his neighbor of water, sink wells on his own land and waste water thus drawn, to his neighbor's injury. The case does not so hold, but denies the *right* of a land owner thus to waste water, not for beneficial use in connection with the land.

Quoting from a Minnesota case the court said:

"Except for the benefit and improvement of his own property, or for his own beneficial use, the owner of land has no right to drain, collect, or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. He must not drain, collect, or divert such waters for the sole purpose of wasting them.

Briefly stated, a land owner must not collect and wantonly waste percolating waters, which would otherwise be, or have theretofore been, appropriated by his neighbor for the general welfare of the people."

Nothing is here said of malice—on the contrary the court in the same opinion observes:

"The *right* being conceded, possibly the intent with which exercised would be immaterial. On this point the authorities are in conflict."

Italics mine.

Strangely enough the Supreme Court of Wisconsin has held on similar facts directly the contrary of this case in Iowa, and to the suggestion that malice was material, observed:

"This court has recently and distinctly held that the exercise of a property right can not be affected or curtailed by a malicious motive."

Therefore, in that case the court held a statute of the state attempting to prohibit waste of water was unconstitutional.

Huber v. *Merkel*, 117 Wis. 355–363.

In that case, *Metzger* v. *Hochrein*, 107 Wis. 267, is cited, where Mr. Justice Marshall, who wrote the opinion in the court below in this case, had occasion to express his views on this subject.

He there said (p. 270):

"True, there are decisions in the State of Michigan, and some *dicta* of courts elsewhere, to the effect that, if one maliciously use his own property to the annoyance of his neighbors, regardless of any physical discomfort to them, he is guilty of an actionable nuisance; the element of malice rendering that an actionable wrong which would otherwise be rightful. That doctrine, however, has very little support. None, in fact, where the rules of the common law have not been changed by legislation and the courts have kept strictly within their legitimate sphere as administrators of the law. The general rule is that whatever a man may lawfully do on his own property under any circumstances, he may do regardless of the motive for his conduct. 16 Am. & Eng. Ency. of Law, 930; *South Royalton Bank* v. *Suffolk Bank*, 27 Vt. 505; *Mahan* v. *Brown*, 13 Wend. 261; *Phelps* v. *Nowlen*, 72 N. Y. 40; *Bordeaux* v. *Greene*, 22 Mont. 254; *Rideout*

v. *Knox*, 148 Mass. 368; *Guest* v. *Reynolds*, 68 Ill. 478. That doctrine is as well defined in the common law as any that has to do with the rights and remedies cognizable by courts, and courts that have departed from it, have as it seems, trespassed upon the domain of the legislative department of the government.

In *Rideout* v. *Knox*, *supra*, the power of the legislature even was questioned to curtail the use by a person of his own property to the extent of preventing its malicious use, the act under consideration being one to prevent the maintenance of unreasonably high fences from malicious motives. The court said, in effect, that the ownership of land carries with it the constitutional right to enjoy such land in any way the owner sees fit, limited only to such external effects as diminish the physical enjoyment of adjoining property; that such right, regardless of the motive for its exercise, is a property right within constitutional protection, the same as any other property right, and can not be interfered with except to the extent of reasonable police regulations; that legislation preventing the unreasonable maintenance of a high fence, where a bad motive is the sole purpose thereof, is within the limits of the constitutional exercise of police power. But it was intimated that legislation, prohibiting the maintenance of a fence where a bad motive for such maintenance *is coupled with some other that would cause it independent of the mere desire thereby to annoy an adjoining owner*, would contravene constitutional rights of property." (My italics.)

I perceive no distinction in this regard between the exercise of a right of property and the exercise of an essential personal right to liberty, both of which are equally secured against state action by the fourteenth amendment.

In *Rideout* v. *Knox*, 148 Mass. 368, S. C., 12 Am. State Rep. 560, Mr. Justice Holmes, after referring to the common law rights in respect of the enjoyment of lands and to the suggestion that, under the common law, the extent of a man's rights might depend upon the motive of their exercise, says:

"We do not so understand the common law; and we con-

cede further that to a large extent, the power to use one's property malevolently in any way which would be lawful for other ends, is an incident of property which can not be taken away even by legislation. It may be assumed that, under our constitution, the legislature would not have power to prohibit putting up or maintaining stores or houses with malicious intent, and thus to make a large part of the property of the commonwealth dependent upon what a jury might find to have been the past or to be the present motives of the owner."

And again on the point in question, construing the statute, which in this regard was as follows:

"Any fence, or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

The learned justice said: "Finally, we are of opinion that it is not enough to satisfy the words of the act that malevolence was one of the motives, but that malevolence must be the dominant motive, a motive without which the fence would not have been built or maintained. A man can not be punished for malevolently maintaining a fence for the purpose of annoying his neighbor merely because he feels pleasure at the thought he is giving annoyance, if that pleasure alone would not induce him to maintain it, or if he would maintain it for other reasons even if that pleasure should be denied him. If the height above six feet is really necessary for any reason, there is no liability, whatever the motives of the owner in erecting it. If he thinks it necessary, and acts on his opinion, he is not liable because he also acts malevolently."

The court below having instructed to the contrary in that case, its judgment was reversed.

I take it the construction of this statute would have been the same had it been aimed at combinations or conspiracies to build fences unnecessarily exceeding six feet in height maliciously, for

the purpose of annoying adjoining owners. And I assume further that had the legislature of Wisconsin adopted such a statute and had it been held by the Supreme Court of Wisconsin to be constitutional, if the motive for erecting such fences were in whole or in part malicious, this court would feel constrained to reverse a conviction obtained under that act on the ground that it was incompatible with the fourteenth amendment; that is to say, provided this court agrees with the views announced by the Supreme Court of Massachusetts in the case referred to.

It may be that an act by an individual, though malicious, may be regarded as lawful, where a combination by several to do the same thing, if malicious, would be regarded as criminal. This concession I make only for the purpose of this discussion; but unless the subject of malice is to be still further confused, if indeed such a thing is possible, the term as employed in reference to both instances must, in a statute, be given a similar interpretation.

I do not wish to take the time to repeat Mr. Krauthoff's amusing quotations from the English law on the subject of the meaning of the term malice; but the declaration of Sir James Fitz James Stephen, "that it seldom has any meaning except a misleading one," and of Mr. Bishop, our own text writer, "that its principal use is to convey away from the writer's mind ideas too misty for distinct utterance," are both worthy of the widest circulation.

It is impossible, however, in discussing American constitutional law, to ignore its sources and inspiration. It has its roots deeply imbedded in the jurisprudence of England, and in the common law of that jurisdiction not only as it existed when this

country was founded, but as it exists to-day; and my confidence in the propriety and integrity of this position is not lessened when I find upon turning to the English authorities that this principle appears to be there distinctly recognized and applied.

It is true that England has no written constitution in a sense. They have in that land institutions of government which are recognized and the jurisdiction and powers of which are as well defined as are those of our own land; but they have no written constitution, no actual Magna Charta of personal or property rights not subject to legislative modification, or indeed absolute and unimpeded sovereign control. But, as I conclude, with no opportunity, however, for personal observation, in no country are the great essential rights of life, liberty and property, more sedulously guarded than they are in England, and it is very seldom that the parliament attempts to deal with such rights in a way that ought to be regarded as contrary to constitutional limitations familiar here. Possibly the Factory Acts, so-called, may be an exception, as also the Irish Land Act.

In the Scotch case cited in my main brief the Lord Ordinary called attention to the fact that in the case before him, which was, I believe, a civil case, the pursuers' averments did not allege that the defenders acted wholly from malice; and he made the very shrewd and sensible observation that that was not a case of mere malicious purpose; "a case which indeed must occur seldom, if at all, in business transactions." It is equally true in this case that there is no allegation in the information that the accused acted solely from a malicious motive to injure the Journal Company.

But in the great case of *Quinn* v. *Leathem*, also cited in my

original brief, and which is, so far as I have been able to gather, the latest expression of the House of Lords upon the general questions discussed by the court below, and which I have no doubt that learned court would have hailed eagerly as sustaining its views with regard to *Allen* v. *Flood*, had it then been decided, the court took up this very phase of the question. I think this is especially material because the learned court below declared that the accused were guilty of an unlawful conspiracy at common law, and that it was only on account of the state of legislation in Wisconsin that resort to the section under consideration was necessary, and that this section is a mere declaration of the common law.

I have quoted somewhat from the opinions in *Quinn* v. *Leathem*, as strongly tending to sustain the position taken for plaintiff in error and as illustrating the distinction between conduct done directly in competition, and wanton conspiracy to injure those with whom the conspirators are not engaged in any competition. But not having the point now under discussion so clearly in mind, when I wrote that brief early in the spring of 1903, under the impression that this case was then about to be called for argument, I omitted to collate the expressions of Lord Shand on this subject. They are so accurate and so conclusive, as they were neither controverted nor modified in any way by what was said in any of the other opinions, that I quote them as follows:

Quinn v. *Leathem*, L. R., A. C. (1901), 495, opinion of Lord Shand:

"In that case I expressed my opinion that while combination of different persons in pursuit of a trade object was lawful,

although resulting in such injury to others as may be caused by legitimate competition in labor, yet that combination for no such object, but in pursuit *merely of a malicious purpose to injure another*, would be clearly unlawful; and having considered the arguments in this case my opinion has only been confirmed."

This was said referring to *Allen* v. *Flood*. The learned Law Lord then added these observations:

"This being clearly so, the question now raised is really whether in consequence of the decision of this house in the case of *Allen* v. *Flood* and of the grounds on which that case was decided, it is now the law that where the acts complained of are in pursuance of a combination or conspiracy to injure or ruin another and *not to advance the party's own trade interests*, and injury has resulted, no action will lie, or, to put the question in a popular form, whether the decision in *Allen* v. *Flood* has made boycotting lawful."

At another point he said:

"As to the vital distinction between *Allen* v. *Flood* and the present case, it may be stated in a single sentence. In *Allen* v. *Flood* the purpose of the defendant was by the acts complained of *to promote his own trade interests* which it was held he was entitled to do, *although injurious to his competitors;* whereas in the present case, while it is clear there was combination, the purpose of the defendants was to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing their own interests."

In concluding he said:

"It is only necessary to add that the defendants here have no such defense as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury, that is to say, they acted by conspiracy, *not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade.* I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff with the result of causing serious injury to him; and that the case of

Allen v. *Flood*, as a case of legitimate competition in the labor market, is essentially different and gives no ground for the defendants' argument."

(My italics.)

Lord Brampton in the course of his opinion observed:

"But I will not linger upon a consideration of what may be done in competition, for competition is not even suggested as a justification of the acts now complained of, acts of wanton aggression, the outcome of a malicious but successful conspiracy to harm the plaintiff in his trade.

"It can not be—it was not even suggested—that these acts were done in furtherance of any of the lawful objects of the association as set forth in their registered rules, according to the statutory requirement, or in support of any lawful right of the association or any member of it, or to obtain or maintain fair hours of labor or fair wages or to promote a good understanding between employers and employed, and workman and workman, or for the settlement of any dispute, for none had existence."

The court below does not find, nor if it did, would any such conclusion be warranted, nor is there any basis for it in the information, that the accused combined, in the language of Lord Shand, not for any purpose of advancing their own interests, but for the sole purpose of injuring the prosecutor in his trade; and Lord Brampton, as quoted, declines to spend time upon a consideration of what may be done in competition, which he declares is not even suggested as a justification of the acts complained of, acts of wanton aggression.

I take it that if a state may prohibit conspiracy to injure a trade competitor by causing him to lose trade, when such conspiracy or combination is not in furtherance of the pecuniary interest of those party to it, then a state may prohibit similar wanton and malicious conduct by an individual, particularly if, as declared by the Wisconsin court, the wrong inflicted by an

individual by such conduct differs only in degree from that following the combined action of several. I hold, however, under the cases cited and upon reason, that this power, if it exist, is limited to prohibition of such wanton and malicious conduct only, and that it does not extend to interdicting all attempt to injure where such occurs in the effort, either singly or in competition, to win trade from a competitor, although the parties engaged in such an effort know and intend that loss to their competitor follow, and even though the desire to inflict such loss be one of the motives that influence them to the course they pursue. Therefore a statute which attempts to accomplish this, is unconstitutional under the fourteenth amendment.

The question now under examination is not primarily whether the accused is guilty as charged, but whether the statute in question is constitutional, if it be construed as covering conduct not wholly malicious. On this point I contend that the right to liberty under the fourteenth amendment is not less than the right to property. And that the analogies of the law as to the limitations contained in that amendment on the power of the state in legislation affecting property rights, are applicable to this case and controlling.

On this ground, quite independently of all other considerations, the judgment below should be reversed.

But leaving this question, I wish to add in conclusion something suggested by a broader and larger view of this case.

I do not contend for the shibboleth that what one may do all may do. As before suggested, when one thousand men act simultaneously and in combination, it can with no propriety nor truth be said that they thus all do what one alone thus acting

would do. Each does what the other does. All together do something, the sum and total of which may be very different.

But this proposition I do contend for: that what an individual has a right to do he may do, and no court nor other agency of the law may justly call his motive in question.

And that in respect of what one thousand men may lawully do in combination, they, each and all, are entitled to the same immunity as to motive that an individual may claim in this regard. (p. 26, my brief.)

Mr. Wigmore, of the Northwestern University, has well said: "The distinction must rest, not upon the quality of the motive, but upon the nature of the outward act. There is no more persistent and yet no more unfounded notion, no notion more fitted to reverse legal relations and make chaos out of definite principles," than the contrary view.

If, for instance, men have a right to act in combination politically, is that right lost because exercised maliciously? Are Democrats, combining out of hatred for a Republican candidate to defeat him, conspirators because they work and vote for their own candidate, not because they like him, but because they dislike his opponent?

If I lose my temper in dealing with a tradesman and consequently discontinue my patronage, am I only protected from liability on the principle *de minimis non*, as suggested by the court below? If I induce others, on account of my grievance, to agree to withdraw their patronage, are we all conspirators and subject to criminal visitation and civil action? and are all innocent if I really had a grievance, and guilty if I had none? Those who

hold this view seem to think that nothing added to nothing makes something. It does not.

No man in trade has a legal right to the patronage of others. If they withhold it he has suffered no legal wrong. He has sustained no injury. For, as the Supreme Court of Rhode Island well said in a case already cited: "It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in a legal sense, means damage resulting from a violation of a legal right." *Macauley* v. *Tierney*, 19 R. I. 255. Where an individual refuses to trade with another he in no sense violates the latter's legal right. He simply exercises a right which is inalienable and constitutional in himself. When two or more join in the exercise of this right, they are not justly chargeable with breach of any duty imposed by law, as to him with whom they thus refuse to trade. Now if one may not ask others to join him in such a course, it must be because the trader in question has a right, in law, to this trade; or because he, the person soliciting this cooperation, owes to the trader the duty to abstain from such solicitation.

I am not familiar with any sound principle of law which either secures this right, or declares this duty. Indeed, to attempt to establish such doctrine seems to be an effort to restrict the natural influence and effect of a sort of public or general opinion, which would ordinarily tend to recognize and reward efficiency, courtesy and other similar qualities in a successful merchant, and visit with loss of trade those lacking these qualities or manifesting others calculated to provoke resentment and repel custom.

That sometimes this right may be exercised harshly and in a manner which involves hardship and apparent injustice does not establish that it does not exist.

This is a field which the law does well not to invade. Any attempt in this direction will cause more wrongs than it will remedy.

Such combination to deprive a man of trade, to which he has no absolute legal right, may be conduct which in a popular sense affects him injuriously; but it can not be regarded as a "direct invasion of those rights which are guaranteed by law and which the law must, therefore, recognize and protect."

The parties engaged in such co-operation exercise their own rights; whether they act maliciously or from motives of self-interest, or from pure benevolence, as in the case of temperance societies, which labor to restrict and injure the business of liquor sellers, is wholly immaterial. It is the conduct or outward act itself, and not the motive, which determines its illegality.

These are my views; and I venture to express them, though not unmindful of the fact that this case does not, perhaps, call for a decision on this point. Obviously those here accused acted from self-interest at least to some extent. And as the court below holds the statute in question applicable to such conduct, it is clearly unconstitutional upon any sound construction of the authorities, including those on which that court seems to rely.

Respectfully submitted,

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